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No. 90-168

In The

# Supreme Court of the United States

October Term, 1990

BRUCE PHILLIP LARSON,

*Petitioner,*

vs.

STATE OF MINNESOTA,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of Minnesota**

## RESPONDENT'S BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether the Confrontation Clause allows admission of the out-of-court statements of a nontestifying five year old victim, unexpectedly declared competent on the eve of trial, where the statements were otherwise admissible under the residual exception to the hearsay rule and the victim was equally available as a witness to the defense had it chosen to call her for cross-examination?

2. Whether the Minnesota Supreme Court's prospective rule, requiring the State to call an available child witness whose hearsay statements are being admitted if expressly requested to do so by the defense, comports with the Confrontation Clause?

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## RESPONDENT'S BRIEF IN OPPOSITION

Respondent respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Minnesota Supreme Court's opinion in this case.

## THE OPINION BELOW

Petitioner seeks a writ of certiorari to review the judgment and opinion of the Supreme Court of Minnesota in *State v. Larson,* 453 N.W.2d 42 (Minn. 1990). This opinion reversed the decision of the Minnesota Court of

Appeals in *State v. Larson*, 447 N.W.2d 593 (Minn. Ct. App. 1989).

## STATEMENT OF THE CASE

On September 3, 1988, petitioner was found guilty by a Minnesota district court jury of one count of criminal sexual conduct in the second degree in violation of Minn. Stat. § 609.343, subd. 1(g) (1986). Investigation of the case had begun on May 1, 1987, when B., a girl then almost four years old, reported sexual contact by her father to a physician's assistant during a medical examination at a family practice clinic. B. had previously complained of vaginal soreness and burning urination and was taken to the clinic for an exam by her mother (T. 172).[1]

The physician's assistant conducting the exam observed redness and swelling around the vaginal opening (T. 173). The examiner, suspecting abuse, asked B. who had touched her. In response, B. said that "Daddy" had touched her with "his bone" that "came out of his pants." B. told the examiner that it had hurt and she had asked him to stop.

Subsequent investigation, which included out-of-court statements by B. to medical personnel, investigators and her mother, led to a complaint being filed on December 15, 1987, charging petitioner with criminal sexual conduct against B.

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[1] "T." refers to the trial transcript.

Because of the prosecutor's good faith belief that B. was incompetent to testify, the State's professed intention from the beginning was to rely solely on the out-of-court statements of B. rather than calling her personally as a witness at trial (*e.g.* 1st O.H. 3; 2d O.H. 4; T. 13-14, 154).[2] B. was only three or four years old at the time of the abuse, and had only recently turned five years old by the trial. Therefore, the prosecutor had serious concerns about her ability to remember and relate facts concerning the incident (T. 33). These concerns were bolstered by the opinion of a psychotherapist. As the prosecutor announced at the first pretrial omnibus hearing:

> I should advise the court at this time that it is not the state's intention to call the victim in this case as set forth in my affidavit due to the fact that it is my opinion after speaking with the victim and the opinion of the psychotherapist, as I understood that opinion, that the victim is not presently competent to testify as to the facts and circumstances surrounding the claimed criminal act.

(1st O.H. 3).

Accordingly, at the June 15, 1988 omnibus hearing, petitioner moved to suppress the out-of-court statements made by B., on the ground that his constitutional right to confrontation would be denied. The parties

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[2] "1st O.H." refers to the transcript of the first omnibus hearing held on June 15, 1988.

"2d O.H." refers to the transcript of the reconvened omnibus hearing held on August 19, 1988.

assumed for purposes of the hearing that B. was incompetent. The trial court ruled that the out-of-court statements were reliable, corroborated, and admissible under Minn. Stat. § 595.02, subd. 3.[3]

At the August 18, 1988 reconvened omnibus hearing, petitioner renewed his motion to suppress B.'s out-of-court statements on constitutional grounds, based on this Court's then recent decision in *Coy v. Iowa*, 487 U.S. 1012 (1988). The trial court again denied petitioner's motion to suppress B.'s out-of-court statements, finding that *Coy* did not apply.

This remained the state of the evidentiary questions until August 30, 1988, the first day of trial, when petitioner informed the trial court that he intended to call B. as a witness (T. 14-16). Therefore, the trial court arranged a competency hearing in chambers before the trial would commence (T. 15). The trial court explained that "it is understood that neither party – if the Court finds [B.] is competent . . . has to call her if they don't wish to do so" (T. 16).

B. was produced by the State for the competency hearing (T. 25). Despite the concerns of the State as to her ability as a witness (T. 15, 33, 38), B. was determined to be competent by the trial court (T. 45). However, in making its competency ruling, the trial court recognized that B.'s ability to remember was very limited (T. 44-45). It said:

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[3] The text of Minn. Stat. § 595.02, subd. 3 is set forth in the petition at pages 4-6.

> The Court recognizes that on the stand she may say nothing more than she doesn't remember, but that doesn't make her incompetent as a witness.

(T. 45).

In any event, neither the State nor petitioner called B. as a witness during the course of the four day trial. The State did not call her in accord with its professed concern whether B. had the ability to present any relevant evidence (T. 154). Instead, the State introduced B.'s out-of-court statements.

The defense failed to call B. for reasons not apparent in the record. However, petitioner did call twelve other witnesses, including defendant himself (T. 459). As part of his defense, petitioner called an expert witness who questioned the investigative procedures used by the State's witnesses (T. 528-579).

At the end of the trial the jury found petitioner guilty of the amended charge of criminal sexual conduct in the second degree (T. 664). On direct appeal the Minnesota Court of Appeals remanded the case, concluding that admission of B.'s out-of-court statements was prejudicial error if she had been properly ruled competent, but that the competency ruling therefore had to be reexamined in that light. *State v. Larson*, 447 N.W.2d 593, 598-599 (Minn. Ct. App. 1989). However, on further review by the Minnesota Supreme Court, the Court of Appeals was reversed and petitioner's conviction affirmed. *State v. Larson*, 453 N.W.2d 42 (Minn. 1990).

## REASONS FOR DENYING THE WRIT

### I. INTRODUCTION

The writ should be denied in this case because there exist no "special and important reasons" for the exercise of this Court's discretionary power of review. U.S. Sup. Ct. Rule 10.1. The Supreme Court of Minnesota was clearly correct in holding that, under the particular facts of this case, petitioner's right of confrontation simply was not violated by admitting the extrajudicial statements of an available but nontestifying child witness where petitioner himself was free to call and cross-examine the child, but declined to do so.

In reaching its decision, the Minnesota Supreme Court correctly applied the basic principles relating to "unavailability" which have already been established in *Ohio v. Roberts*, 448 U.S. 56 (1980) and *United States v. Inadi*, 475 U.S. 387 (1986). Accordingly, there is no need to revisit the subject area. Furthermore, the unique factual situation presented by this case, where a young child with limited ability to remember was unexpectedly (and just barely) found competent on the eve of trial, is unlikely to recur on any sort of regular basis. Therefore, the petition herein should be denied.

### II. THE MINNESOTA SUPREME COURT CORRECTLY APPLIED ESTABLISHED CONFRONTATION CLAUSE PRINCIPLES TO THE PARTICULAR FACTS OF THIS CASE.

Petitioner contends that this case presents an opportunity to address the allegedly unsettled question of when "unavailability" is required by the Confrontation

Clause before admitting extrajudicial statements in a criminal trial; a question which petitioner argues was left open by *Idaho v. Wright*, ___, U.S. ___, 110 S.Ct. 3139 (1990). Petition at 15-20. However, there is nothing unsettled about that question at all. The basic principles relating to the Confrontation Clause's "unavailability" requirement are already well established. Furthermore, the Minnesota Supreme Court correctly applied those principles to the unique facts of this child sexual abuse case.

In *Ohio v. Roberts*, 445 U.S. 56 (1980) this Court drew upon its previous Confrontation Clause jurisprudence to generally establish what has come to be known as the "unavailability" requirement, but which can be more accurately defined as a rule of "necessity." This Court held that:

> First, in conformance with the Framers' preference for face-to-face accusation, the Sixth Amendment establishes *a rule of necessity*. In the usual case (including cases where prior cross-examination has occurred), the prosecution must *either produce*, or *demonstrate the unavailability of*, the declarant whose statement it wishes to use against the defendant.

*Id.* at 65 (emphasis added).

Thus it is already settled that the State may meet the necessity requirement by *either* producing the witness *or* demonstrating her unavailability. In fact, *Roberts* itself specifically noted that a "demonstration of unavailability . . . is not always required."; especially in cases where the utility of trial confrontation would be minimal. *Roberts* at 65, n.7. In this case, B. was produced at trial and equally

available to both sides. The fact that she was not called as a witness by the defense is an implicit admission that the utility of confronting her at trial was too remote to invoke constitutional concern over her "availability."

Likewise, to respondent's knowledge the requirement for production of a witness has never been interpreted, at least since *Roberts*, to require that the witness actually be called to the stand, so long as the witness is available to the defense for cross-examination if it so chooses. It is the opportunity for cross-examination which the Confrontation Clause requires, not that cross-examination actually occur. *See Roberts* at 70; and *Lee v. Illinois*, 476 U.S. 530, 549 n.3 (1986) [Blackmun, J., joined by three other Justices, dissenting on other grounds]. *See also Tennessee v. Street*, 471 U.S. 409, 416 (1985) ["It was appropriate that, instead of forcing the State to call a witness who could offer no relevant testimony on the immediate issue . . . , the trial judge left to respondent the choice whether to call (the declarant)"].[4]

Nothing in *United States v. Inadi*, 475 U.S. 387 (1986), is contrary to these basic principles. *Inadi* simply recognized that the "unavailability" language of *Ohio v. Roberts*, 448 U.S. 56, 65 (1980) was not intended "as an abstract answer to questions not presented in that case,

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[4] At least two of the federal circuits have, since *Roberts* found that the government's burden is met by simply obtaining an available hearsay declarant's presence at trial or making the declarant available to the defense, without the need for actually calling the witness to testify. *United States v. Massa*, 740 F.2d 629, 640 n.6 (8th Cir. 1984) *cert. denied* 471 U.S. 1115; and *Reardon v. Manson*, 806 F.2d 39, 42-43 (2d Cir. 1986) *cert. denied* 481 U.S. 1020.

but rather as a resolution of the issue the Court said it was examining . . . " *Inadi* at 392-393. *See also, Bourjaily v. United States,* 483 U.S. 171 (1987) (The two pronged unavailability and reliability approach of *Roberts* was set forth "as a general matter only"]. Thus, far from being in conflict, the basic principles established in both *Roberts* and *Inadi* are in agreement regarding the admission of out-of-court statements under the Confrontation Clause.

This agreement was expressly recognized in *Idaho v. Wright,* ___ U.S. ___, 110 S.Ct. 3139 (1990), when this Court said:

> In *Ohio v. Roberts,* we set forth "a general approach" for determining when incriminating statements admissible under an exception to the hearsay rule also meet the requirements of the Confrontation Clause.
>
> . . . .
>
> We have applied the general approach articulated in *Roberts* to subsequent cases raising Confrontation Clause and hearsay issues. In *United States v. Inadi, supra,* we held that the general requirement of unavailability did not apply to incriminating out-of-court statements made by a nontestifying co-conspirator and that therefore the Confrontation Clause did not prohibit the admission of such statements, even though the government had not shown that the declarant was unavailable to testify at trial. 475 U.S. at 394-400.

*Id.* at ___, 110 S.Ct. at 3146.

*Inadi* did nothing more than recognize that there were going to be cases, such as those involving statements by co-conspirators, where a declarant of otherwise admissible hearsay would technically be "available," but

would not be called to the witness stand by either side for a variety of reasons. *Inadi* at 396-398. This Court wisely reasoned that application of a mechanical unavailability rule in such circumstances is not required by the Confrontation Clause, holding that:

> Any marginal protection to the defendant by forcing the government to call as witnesses those co-conspirator declarants who are available, willing to testify, hostile to the defense, and yet not already subpoenaed by the prosecution, when the defendant himself can call and cross-examine such declarants, cannot support an unavailability rule.

*Inadi* at 399-400.

In the case at hand, the Minnesota Supreme Court followed the same reasoning as *Inadi*. Here, B. was actually "produced" by the State and "available" for cross-examination. However, because of her tender age and marginal ability to remember and relate distasteful events that occurred over a year before trial, the State decided, openly and in good faith, not to call her to the witness stand.

None of this denied petitioner his right of confrontation. B. had been declared competent (albeit unexpectedly so) by the trial court. Therefore, petitioner was free to call her to the stand himself to confront her about the extrajudicial statements she had made against him. But, as the Minnesota Supreme Court correctly noted, petitioner did not do so because it was "not at all clear that it was in the interests of the defendant that the declarant be called by either side." *Larson*, 453 N.W.2d at 45-46. Clearly, the Minnesota Supreme Court correctly found that petitioner

had been afforded his right of confrontation, but simply chose not to exercise it.

There is no unsettled question of unavailability raised in this case which is worthy of further review.

As for petitioner's claim that Minnesota's decision will somehow open the floodgates to trials being held without any victim testimony (Petition at 25-27), this is a false specter indeed. In this country the availability of circumstantial as well as direct evidence has meant that all manner of criminal trials have for years been conducted without the direct testimony of the victims themselves. Homicide cases are the most obvious example; but they also include burglaries of unoccupied premises, "blind-side" assaults, and other similar cases. In each instance the question is whether the evidence actually relied upon by the prosecutor is constitutionally admissible; not whether the prosecutor could have presented something better. In any event, given the heavy burden of proof placed upon prosecutors, it can be reliably said that the vast majority of prosecutors who have direct victim testimony available will continue to make every attempt to use it at trial.

## III. THE FACTUAL SITUATION PRESENTED BY THIS CASE IS NARROW, IF NOT UNIQUE, AND IS UNLIKELY TO RECUR ON ANY TYPE OF REGULAR BASIS.

Another reason for denying certiorari in the instant case is that it does not pose an *important* federal question because of the very narrow and unusual set of facts presented herein. The usual situation in cases of child

sexual abuse finds the prosecution offering the testimony of the victim as the main pillar of its case. *See, e.g., Maryland v. Craig,* ___ U.S. ___, 110 S.Ct. 3157 (1990); and *Coy v. Iowa,* 487 U.S. 1012 (1988). Likewise, it is usually the defense which attempts to prevent such evidence by arguing that the witness is incompetent.

Here, however, the roles were reversed in a situation that is not likely to recur often, if at all. The prosecution, supported by an expert's opinion, realized from the very beginning that B. was the type of very young girl who would not be able to remember or relate at trial the abuse which she had earlier reported happened to her over a year before the trial (1st O.H. 3). The prosecution, the defense, and the trial court all assumed her incompetent to testify and thus unavailable prior to trial. Consequently, there was no thought prior to trial of holding a competency hearing.

But petitioner, on the first day of trial, announced his intention to possibly call B. as a witness (an intention that was not, in the event, fulfilled), thereby causing the trial court to hold a competency hearing. At the end of that hearing B. was unexpectedly found competent, although in finding her so the trial court recognized the strong possibility that B. may not be able to remember anything (T. 45); and expressly told counsel that neither party had to call her (T. 16).

Given these circumstances it is hardly surprising that the prosecution continued with its planned strategy of not calling B. and instead relying upon other evidence, including B.'s otherwise admissible hearsay statements, to prove its case. What is surprising, however, is the fact

that petitioner did not call B. himself, even though she had been "produced" by the State and was made available for cross-examination by the trial court's competency ruling.

Why petitioner did not call B. is not apparent from the record. What is apparent, however, is that petitioner's failure to call a witness whom the State had produced, and who had been found competent (albeit barely so) at petitioner's own request, is a very narrow, if not unique, set of facts. Because it is highly unlikely to recur on any sort of regular basis, the question is not an important one for this Court to review.

## IV. THE MINNESOTA SUPREME COURT'S PROSPECTIVE RULE, REQUIRING THE STATE TO CALL AN AVAILABLE WITNESS WHOSE HEARSAY STATEMENTS ARE BEING ADMITTED WHEN REQUESTED BY THE DEFENSE TO DO SO, IS A STATE RULE WHICH ADDS TO DEFENDANTS' RIGHTS AND DOES NOT DIMINISH THE CONSTITUTIONAL RIGHT OF CONFRONTATION IN THE LEAST.

On pages 21-25 of his petition, petitioner claims that the prospective state rule adopted by the Minnesota Supreme Court is a question for this Court to review. However, the rule effectively grants defendants more than what the constitutional rights to compulsory process and confrontation require. Clearly, this is not a federal question, much less an important one.

Minnesota's rule, which requires the State to call available child hearsay declarants when expressly requested by the defense to do so, *Larson*, 453 N.W.2d at

47, is obviously based upon the Minnesota Supreme Court's own supervisory power over evidentiary and procedural questions within Minnesota's criminal justice system.

In fashioning its rule the Minnesota Supreme Court cited no federal authority. it simply said, by way of justification, that:

> We recognize, however, that a defendant who wants to cross-examine an available child witness whose extrajudicial statements are being used by the state should not be compelled to call the child as a witness if the defendant would prefer that the state call the witness.

*Id.* at 47. This is the sort of reasoning used by state appellate courts in exercising their supervisory authority. It is certainly not based upon any federal constitutional imperative.

Nor does the rule violate any federal constitutional provision. The Confrontation Clause does not absolve defendants from procuring witnesses they feel are important to their defense. As explained in Part I, *supra*, it has become clearly established that the right to confrontation is satisfied if a defendant has the opportunity to call the declarant of hearsay as a witness for cross-examination. *Inadi*, 475 U.S. at 397-399; *Tennessee v. Street*, 471 U.S. at 416; *Lee v. Illinois*, 476 U.S. at 549 n.3 (Blackmun, J., dissenting on other grounds); *Reardon v. Manson*, 806 F.2d at 42; and *United States v. Massa*, 740 F.2d at 640 n.6. Minnesota's rule simply adds the option of allowing the defense to force the State to call such witnesses, without requiring the defense to put on a case at all.

Likewise, there is no merit to petitioner's contention that Minnesota's prospective rule somehow shifts the burden of proof to defendants. The State must still prove its case beyond a reasonable doubt, and if it cannot do so on its case-in-chief then there will be a dismissal and the defense need do nothing. If anything, the new rule adds to the State's burden rather than defendant's, by requiring it to call hearsay declarant witnesses even in those rare cases where the State feels that it can prove is case-in-chief without them.

Because Minnesota's prospective rule is a local one that adds to defendants' rights rather than diminishes them, it is not an important federal question.

## V. THE MINNESOTA SUPREME COURT'S FACTUAL FINDING OF SUFFICIENT CIRCUMSTANTIAL GUARANTEES OF TRUSTWORTHINESS IS IN ACCORD WITH THE RELIABILITY STANDARDS OF *IDAHO V. WRIGHT.*

In this case the Minnesota Supreme Court admitted B.'s hearsay statements under two exceptions to the hearsay rule. In one instance B.'s statements made for the purpose of medical diagnosis or treatment were found admissible under Minnesota's medical treatment exception, Minn. R. Evid. 803(4), *see* 453 N.W.2d at 47; which is one of the "firmly rooted" hearsay exceptions. *Idaho v. Wright*, ___ U.S. at ___, 110 S.Ct. at 3149.

In the case of B.'s other statements, they were admitted under the residual exception applicable even though the declarant is available as a witness, Minn. R. Evid.

803(24). In doing so the Minnesota Supreme Court specifically addressed the factual issues involved and found that: "We are satisfied that the out-of-court statements by the victim in this case had sufficient circumstantial guarantees of trustworthiness to justify their admission under this rule." 453 N.W.2d at 47.

This factual finding is fully in accord with the "sufficient indicia of reliability" test established by *Roberts* and applied in *Idaho v. Wright*. Indeed, *Wright* itself reaffirms that the constitutional requirement of reliability is to be drawn from the "totality of circumstances" surrounding the making of the hearsay declaration. *Id.* 110 S.Ct. at 3149.

Because there is nothing in the opinion of the Minnesota Supreme Court which indicates that it relied for trustworthiness upon circumstances other than those surrounding the making of B.'s out-of-court statements, there is no basis for either review or remand by this Court. Absent a showing of clear error, such factual determinations by state courts of competent jurisdiction should remain undisturbed.

## CONCLUSION

For all the above reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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